No. 75-1692

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN DAVID MOORE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. G) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1976, and a petition for rehearing was denied on April 22, 1976. The petition for a writ of certiorari was filed on May 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction.

2. Whether the district court erred in refusing to order disclosure of an informant's identity.

STATEMENT

After a bench trial in the United States District Court for the Western District of Texas, petitioner was convicted of possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to six years' imprisonment and to a special parole term of six years. The court of appeals affirmed in an unpublished *per curiam* opinion (Pet. App. G).

The evidence showed that on January 7, 1975, police officers received a tip from a reliable informant that petitioner and others were in possession of heroin at an El Paso, Texas, apartment. The police immediately obtained a search warrant and entered the apartment, where they found petitioner lying face down on the living room floor near a coffee table (Tr. 48). A balloon filled with heroin was on the table and a small bag of heroin was underneath the table (Tr. 46). Petitioner and another occupant of the room, Isabel Cueva, were arrested, and approximately five ounces of heroin, together with milk sugar, a scale, and other narcotics paraphernalia, were seized (Tr. 50-52).[1]

Prior to trial, petitioner moved to suppress the fruits of the search on the ground that the warrant had been issued without probable cause.[2] With petitioner's consent (Tr. 10), the trial judge consolidated the suppression hearing and the trial on the merits, stating that he would rely on counsel in final argument to "sort out" the evidence relevant to the motion to suppress from that admissible on the issue of guilt or innocence (Tr. 17).

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[1]The government dismissed the case against Cueva before trial.

[2]Petitioner also filed a pretrial motion for disclosure of the informant's identity.

The government then called several police officers, who testified that they had received information from a reliable informant concerning narcotics activities in an apartment in El Paso and had obtained a search warrant based on this information.[3] In addition, an officer testified that the informant's tip had been corroborated by information he had previously received from separate sources that petitioner "had quite a few gentlemen selling heroin for him" from his apartment (Tr. 30-32). Finally, the details of petitioner's arrest and of the seizure of the heroin were recounted (Tr. 46-52). Petitioner did not testify and called no witnesses on his behalf. At the conclusion of trial, the district court denied the motion to suppress and found petitioner guilty of possession of heroin, finding *inter alia* that "[t]he search warrant * * * was a lawful search warrant, based upon sufficient probable cause, and was executed properly" and that petitioner had been "found in close proximity to the * * * heroin" (Pet. App. 12a, 10a).

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the evidence failed to demonstrate his actual or constructive possession of the heroin but showed only his "mere presence" in the area in which the contraband was found. Viewed in the light most favorable to the

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[3]The search warrant affidavit stated in part: "I [the affiant] have been informed of the following facts by a person who I know to be reliable, credible, and trustworthy, who stated the following: that John D. Moore and others whose names, descriptions and identities [are] unknown to him, have a quantity of heroin concealed in their apartment located at the above described location. That he (the informant) had been to Moore's apartment within the past 24 hours and had personally observed two clear plastic baggies containing brown powder on top of the kitchen table."

government (*Glasser* v. *United States*, 315 U.S. 60, 80), however, the officers' testimony that petitioner was discovered in the immediate vicinity of the unconcealed heroin was sufficient to support a finding of dominion or control. See *United States* v. *Turner*, 505 F. 2d 477 (C.A. D.C.), certiorari denied, No. 75-5724, January 12, 1976.[4] Contrary to petitioner's apparent contention (Pet. 8), the government was not required to prove petitioner's possessory or other interest in the apartment in order to convict him of possessing the narcotics that were alongside him upon his arrest.

Petitioner correctly notes that the trial court apparently relied upon evidence introduced on the motion to suppress to support its finding that petitioner was in constructive possession of the heroin. In particular, the court referred in its findings of fact to the informant's statement to the police (Pet. App. 13a) that petitioner was the occupant of the apartment at the time of the seizure. Although we agree with petitioner that reliance on this hearsay statement in determining petitioner's guilt or innocence

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[4]The circumstances of this case, we submit, offer a far stronger showing of constructive possession of the contraband than was presented in the cases upon which petitioner relies. In *United States* v. *Stephenson*, 474 F. 2d 1353 (C.A. 5), the only evidence of possession was the presence of the defendant's fingerprints on glassine envelopes that contained narcotics. As the court of appeals noted (*id.* at 1354), the fingerprints could have been placed on the envelopes "as long as a year before the seizure when the envelopes were empty." In *United States* v. *Martin*, 483 F. 2d 974 (C.A. 5), although the defendant had been present during conversations between her roommate and an undercover agent concerning a sale of drugs, there apparently was no proof that drugs were either present or within the defendant's reach at the time of the conversations. Finally, in *United States* v. *Ferg*, 504 F. 2d 914 (C.A. 5), the defendant was merely a passenger in the front seat of a vehicle in which narcotics were found concealed behind the rear seat.

was improper, it is clear that in the circumstances of this case any error was harmless. First, as previously noted, petitioner's guilt was clearly demonstrated beyond a reasonable doubt on the basis of the evidence properly admitted at trial. See *Kotteakos* v. *United States*, 328 U.S. 750, 764.[5] In addition, petitioner offered no evidence to rebut the testimony of the police officers, nor did he attempt to prove that his presence in the apartment was unrelated to the heroin. See *United States* v. *Frank*, 494 F. 2d 145, 153 (C.A. 2), certiorari denied, 419 U.S. 828. Particularly significant in this regard is petitioner's failure to call Cueva, who also had been present in the apartment at the time of the search. Moreover, petitioner agreed to a combined suppression hearing and trial and accepted the court's proposal that the evidence relevant to the respective issues should be sorted out in closing argument. At no point during closing argument, however, did petitioner seek to restrict the court's consideration of the hearsay evidence to the suppression issue. Cf. *United States* v. *Bey*, 526 F. 2d 851, 855 (C.A. 5); *United States* v. *Carney*, 468 F. 2d 354, 357 (C.A. 8). Finally, it is of course relevant to a determination of prejudice that petitioner's trial was by the court without a jury. *United States* v. *Empire Packing Co.*, 174 F. 2d 16, 20 (C.A. 7), certiorari denied, 337 U.S. 959.

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[5]Petitioner does not challenge the legality of the police officers' search of the apartment or of his arrest. On this record, such an argument could not be maintained, since the search warrant was properly issued on the basis of the recent, personal observations of criminal activity by a reliable informant. *Spinelli* v. *United States*, 393 U.S. 410, 416; *Aguilar* v. *Texas*, 378 U.S. 108, 114. Therefore, the officers' testimony concerning petitioner's constructive possession of the heroin at the time of his arrest was admissible.

2. Petitioner contends (Pet. 9-10) that the trial court compounded its error in considering the hearsay evidence by refusing to order disclosure of the informant's identity. For the reasons we have previously stated, any error in considering that evidence on the issue of petitioner's guilt does not warrant a new trial. Furthermore, the district court was not required to order disclosure of the informant's name in ruling on the motion to suppress. The test for determining whether an informant's identity should be revealed was outlined in *Roviaro* v. *United States*, 353 U.S. 53, 62:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Thus, *Roviaro* makes clear that the Court "was unwilling to impose any absolute rule requiring disclosure of an informer's identity * * *." *McCray* v. *Illinois*, 386 U.S. 300, 311. The striking of a proper balance between a defendant's demand for disclosure and the government's legitimate need for confidentiality is addressed to the sound discretion of the district court. See, *e.g.*, *United States* v. *Anderson*, 509 F. 2d 724 (C.A. 9), certiorari denied, 420 U.S. 910; *United States* v. *Bell*, 506 F. 2d 207, 215-216 (C.A. D.C.).

The trial judge did not abuse his discretion in this case. In upholding the validity of the warrant, the court was entitled to credit the "evidence submitted in open court and subject to cross-examination, that the officers

did rely in good faith upon credible information supplied by a reliable informant." *McCray* v. *Illinois*, *supra*, 386 U.S. at 305. Moreover, the confidential informant was not a witness to the offense of which petitioner was convicted (see *United States* v. *Clark*, 482 F. 2d 103, 104 (C.A. 5)), and his tip was not the only evidence relied upon by the police prior to the search. Information also had been received from other sources that petitioner was conducting a drug operation at the apartment (Tr. 30). In these circumstances, the court could properly conclude that the government's interest in maintaining the confidentiality of its informant outweighed any advantage that disclosure would have afforded petitioner in combating the showing of probable cause for the warrant.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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